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Bf. of Brown, C. E. in Pro. Per

In the Supreme Court

Filed May 17, 1902.

OF THE

UNITED STATES.

The Equitable Life Assurance Society of the United States.

Plaintiff in Error.

v.

Cecil Brown, Administrator of the Estate of David B. Smith, Deceased.

Defendant in Error.

Error to the Supreme Court of the Territory of Hawaii.

BRIEF OF DEFENDANT IN ERROR.

BY

CECIL BROWN,

Administrator of the Estate of David B. Smith, Deceased, in propria persona.

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IN THE

Supreme Court of the United States

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
PLAINTIFF IN ERROR.

v.

CECIL BROWN, ADMINISTRATOR OF THE ESTATE OF DAVID B. SMITH, DECEASED,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This is an action on a policy of insurance for $25,000 upon the life of David B. Smith, deceased. It was brought in the Circuit Court of the First Circuit, Territory of Hawaii, by the administrator of his estate, appointed by a Circuit Judge of said Court sitting in Probate. Another action on the same policy was subsequently brought in the Circuit Court of the United States for the Southern District of New York by ad-

ministrators appointed in the Surrogate's Court of the County of New York. The action in Hawaii was tried before a jury, who rendered a verdict for the administrator, and then went to the Supreme Court of the Territory on exceptions taken by the defendant insurance company. These exceptions were by the higher court overruled, and the case now comes to the Supreme Court of the United States on writ of error allowed by the Chief Justice of the Territory of Hawaii.

Errors Assigned.

The errors assigned are, in brief, as follows: That the judgment of the Supreme Court of the Territory of Hawaii, being the highest court of law and equity of the said Territory in which a decision could be had therein, should be reversed, first, because of the pendency of another action in the Circuit Court of the United States for the Southern District of New York: second, because of the exclusion, as evidence, of the exemplified copy of the proceedings upon the appointment of the administrators aforesaid in the Surrogate's Court of the County of New York, and because of the exclusion, as evidence, of the exemplified copy of the proceedings had in said United States Circuit Court, all of said exemplified copies having been offered in evidence for the purpose of maintaining that judgment ought not to be entered against said insurance company, because of said proceedings in New York and because Section 1, Article 4 of the Constitution of the United States, providing that full faith and credit shall be given in each state to the public acts and judicial proceedings of every other state, which clause of said Constitution was by Section 905 of the Revised Statutes made effective in the Territories, required the abatement of the proceedings in the courts of Hawaii, and all of said exemplified copies being offered under claim of exemption from liability to defendant in error herein by virtue of said clause in said Constitution and said statute

and also by virtue of the Act of Congress of April 30, 1900, entitled An Act to Provide a Government for the Territory of Hawaii.

ARGUMENT.

The defendant in error claims that the courts of the Territory of Hawaii had jurisdiction both of the subject-matter and of the person; and such jurisdiction cannot be ousted by the proceedings of the New York courts, which have not as yet even resulted in a judgment. The facts show that the steps or proceedings taken by the parties in New York were subsequent to those had in the Territory of Hawaii, and even if the rejected evidence offered by plaintiff in error had been admitted, judgment must have been for the defendant in error.

I.

THE "FAITH AND CREDIT" CLAUSE OF THE CONSTITUTION, SEC. 1, ART. 4, AND SEC. 905 U. S. REV. STAT. DO NOT REQUIRE THAT A COURT SHOULD SURRENDER ITS OWN JURISDICTION FIRST ACQUIRED.

In this connection, the opinion of the Territorial Supreme Court overruling the exceptions of the insurance company, is worthy of consideration. The court, by Chief Justice Frear, says:

"Counsel seem to lay special stress upon the 'faith and "credit' clause of the Constitution. That and Section 905 of "the Revised Statutes might require us to regard the appoint- "ment of the administrators in the Surrogate's Court in New "York as valid, provided that court had jurisdiction in the

"matter, but it would not require an abatement of this action "merely because an action had been instituted in the Circuit "Court of the United States, even if that action had been "commenced first. See *Smith v. Lathrop*, 44 Pa. St. 326; "*Stanton v. Embry*, 93 U. S. 548. The effect of the institu- "tion of that action would depend on the application of the "doctrine of *lis pendens* and not upon that clause of the Con- "stitution. No judgment has been rendered in that action. "It is immaterial to this case whether the appointment of the "administrators in New York was valid or not. The appoint- "ment of the administrator here also was valid. The question "is whether the administrator should under the circum- "stances be allowed to recover on the policy. The appoint- "ment of the administrator here preceded the appointment of "the administrators in New York. The proofs of death were "furnished by the administrator appointed here before they "were furnished by the administrators appointed there. "Action was begun here before it was begun there. The "decedent was domiciled here at the time of his death and "had long resided here, and as far as appears had never re- "sided in New York. The policy was applied for here, was "delivered here and was found by the present plaintiff here "among the decedent's papers after his death. The rest of "the decedent's property also was here. The administrator "was appointed here on the petition of the decedent's daughter "who was his only heir. The administrators there were ap- "pointed on the petition of one of the decedent's aunts. The "defendant has a place of business here and a general agent "here. The policy is payable to the assured's administrator. "Service of process was made on the general agent here, who, "we presume, is the person designated for such purpose by the "defendant under the statute (Civ. L. Ch. 130, since amend- "ed, Laws of 1898, Act 45). At any rate, the defendant "answered generally, and did not question the validity of the "service. Under the circumstances, it would seem that, if "there should be any yielding, whether by comity or under "the 'faith and credit' clause of the Constitution or the doc- "trine of *lis pendens* or for any other reason, it should be by "the courts in New York rather than by those here, and such "would seem to be the view taken both in the Federal courts "and in the New York courts. At any rate, the action here "was properly brought and the pendency of a subsequent

"action elsewhere is no ground for an abatement of the prior "action here.

"The leading case is that of the *New Eng. Mut. Life Ins. "Co. v. Woodworth*, 111 U. S. 136. In that case the assured "was domiciled in Michigan when the policy was issued, but "died in New York. Her husband afterwards removed to "Illinois and took the policy with him. The insurance com- "pany was a Massachusetts corporation and the policy was "by its terms payable at its office in Boston, but the company "was doing business in Illinois and could be reached there by "process. It was held that the policy was assets in Illinois, "that the husband was properly appointed administrator there "whether there was other property there or not, that he might "properly sue on the policy there and that payment there "would protect the company from paying a second time in "Massachusetts or elsewhere.

"In *Smith v. New York Life Ins. Co.*, 67 Fed. R. 694, the "assured was domiciled in Illinois when the policy was issued "and at his death. An administrator was appointed in Illinois "who brought suit there on the policy. The assured's wife, "however, had removed to California where she was and had "the policy at the time of his death. It was held, affirming "57 Fed. Rep. 133, that she was properly appointed adminis- "tratrix there and could properly sue there on the policy not- "withstanding the appointment and suit in Illinois.

"In *Gamble v. City of San Diego*, 79 Fed. Rep. 487, it "was held that where a state court had first acquired jurisdic- "tion, a Circuit Court of the United States should either dis- "miss a similar action brought there or else at least suspend "proceedings until the final action of the state court.

"In *Stout v. Lee*, 103 U. S. 66, it was held that where a "state court first acquired jurisdiction, its decree barred fur- "ther proceedings in a Circuit Court of the United States in "a suit begun after suit but before decree in the state court.

"In *Sulz v. M. R. F. L. Ass'n*, 145 N. Y. 563, the assured "was domiciled in New York but was temporarily in Califor- "nia when the policy was issued. He was domiciled and had "the policy in Washington when he died. An administrator "was appointed and brought suit there on the policy. The

"insurance company was a New York corporation and the "policy was payable at its office in New York City. It was "held, reversing the trial court, that, as the Washington court "had first acquired jurisdiction and the policy was there when "the assured died, the New York court should refuse to en-"tertain jurisdiction.

"In *Equitable Life Assurance Society v. Vogel's Execu-"tors*, 76 Ala. 441, 52 Am. Rep. 344, the assured was domi-"ciled in Alabama when the policy was issued and when he "died. The policy was there also. The insurance company "was a New York corporation. It was held that the executrix "appointed in Alabama could maintain an action on the pol-"icy there, although an administrator had been appointed in "New York."

The authorities cited in this decision would seem to settle the question. We, therefore, content ourselves with merely adding the following without discussion:

A policy of insurance is personal property and suit brought by the administrator at the place where the policy is, prevails.

New Eng. Life Ins. Co. v. Woodworth, 111 U. S. 138;
Beach on Law of Insurance, Vol. 2, p. 751, § 1276.
See also *Wyman v. Halstead*, 109 U. S. 654;
Smith v. N. Y. Life Ins. Co., 57 Fed. Rep. 133;
N. Y. Life Ins. Co. v. Smith, 67 Fed. Rep. 694, (same case as that last cited, on appeal).

The contract of insurance is personal in its nature and action may be brought wherever service may be had upon the insurer.

Ins. Co. of No. America v. McLimans, 28 Neb. 653; 44 N. W., 991.

An administrator of the insured appointed in the State *where the policy is and who has possession of the policy* may recover thereon as against an administrator appointed in some other state even though appointed in the state in which insured resided at the time of his death. Thus, if a policy is issued by a New York corporation payable to the legal representatives of the insured, who dies in a foreign state, and administrators are appointed in each state, and an action is first brought on the policy by the foreign administrator, who obtains service of process on an agent of the company, and the courts of that state have assumed jurisdiction of the case, the courts of New York will not assume jurisdiction of a second action brought by the New York administrator. In such a case the principle of comity between states requires a refusal upon the part of the courts of the state where the second action is brought, to entertain jurisdiction.

Sulz v. Mut. Res. Fund L. Assn., 145 N. Y. 563;
Joyce on Insurance, § 3499.

Thus, also, an administrator in New York cannot enforce the payment of a policy of insurance issued by a company incorporated in that state to a resident of the state of Maine, when the policy had never thereafter been within the state of New York, even though the principal office of the company was in the city of New York.

Morrison, Pub. Admr. v. Mutual L. Ins. Co., 10 N. Y. Supp., 445; 57 Hun. 97.

Holyoke v. Union Mutual L. Ins. Co., 22 Hun. 75.

II.

THERE IS NO FEDERAL QUESTION INVOLVED IN THIS CASE. THE CASE REQUIRED NO CONSTRUCTION OF THE CONSTITUTION OR STATUTES.

"Where the question is not as to the validity of the Consti-"tution or Act but merely as to the application of the same to "the case, no Federal question is involved."

2 Desty's Fed. Procedure (9th ed.) § 223, p. 778;
Cameron v. United States, 146 U. S. 533.

III.

THE FEDERAL QUESTION WHICH PLAINTIFF IN ERROR ATTEMPTS TO RAISE IS FRIVOLOUS AND CAN NOT GIVE THE UNITED STATES SUPREME COURT JURISDICTION IN THIS CASE.

"A real and not a fictitious Federal question is essential to "the jurisdiction of this court. *Millinger v. Hartupee*, 6 "Wall. 258; *New Orleans v. New Orleans Water Works*, "142 U. S. 79, 87. In the latter case it was said that 'a bare "averment of a Federal question is not in all cases sufficient. "It must not be wholly without foundation. There must be "at least color of ground for such averment, otherwise a Fed-"eral question might be set up in almost any case, and the "jurisdiction of this court invoked simply for the purpose of "delay.' "

Wilson v. North Carolina, 169 U. S. 586, at p. 595;
Hamblin v. W. Land Co., 147 U. S. 531.

CECIL BROWN,

Administrator of the Estate of D. B. Smith in propria persona, Defendant in Error.

Honolulu, T. H., April 24, 1902.